(2)

No. 06-1514

FILED
JUL 18 2007
OFFICE OF THE CLERK
SUPREME COURT, U.S.

In the Supreme Court of the United States

MICHAEL A. THOMAS, *PRO SE*,
Petitioner,

v.

JOHN E. POTTER, Postmaster General,
United States Postal Service,
Respondent.

On Petition for a Rehearing to the United States Court of Appeals for the Seventh Circuit

PETITION FOR REHEARING

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July 18, 2007

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QUESTION PRESENTED FOR REVIEW

This case presents two conflicting decisions made by this court. Petitioner respectfully submits and asks this court to give clarification as to why this court deviated from its original decision, whereby consideration by the full court is therefore necessary to secure and maintain uniformity of this court original decision of June 30 2006.

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OPINIONS BELOW

The Seventh Circuit Court of Appeals issued its unpublished order on October 11, 2006. *See* Appendix A. The Seventh Circuit Court of Appeals denied rehearing en banc on December 14, 2006. *See* Appendix B.

JURISDICTION

On October 11, 2006 The U.S. Court of Appeals for the Seventh Circuit upheld and affirmed the District Court decision. A timely petition for rehearing was denied by U.S. Court of Appeals on December 14, 2006, and a copy the order denying rehearing appears at Appendix B. This court has instant Jurisdiction, pursuant to 28 U.S.C. 1254(1) to review the final decision from the U.S. Court of Appeals.

STATUTORY PROVISION INVOLVED

The statutory provision involved is Title VII. The Petitioner asserts Respondent has violated Title VII through its acts of gender discrimination and retaliation.

GROUNDS FOR REHEARING

On June 30, 2006 this court granted the Petition for a Wri of Certiorari, vacated the judgment, and remanded this case, case number 05-1267 to the United States Court of Appeals for the Seventh Circuit for further consideration in light of *Burlington Northern and Santa Fe Railway v. White*, 548 U.S. __ (2006).

Despite the case number changing, the facts and evidence(s) in this case has not change on June 25, 2007 (one year later) this court denied the Petition for a Writ of Certiorari, whereas there are now two decisions for this one case. Therefore in order to maintain uniformity its exceptional importance to give clarification.

Factual Background

On October 11, 2006 the United States Court of Appeals for the Seventh Circuit denied reconsideration and affirmed their previous decision stating "*Burlington Northern* does not alter the outcome of the case, unless there was intentional, non-employment related harm to Thomas from the shift change".

Pertinent Fact(s)

Pursuant to the National Agreement between the United States Postal Service and the American Postal Workers Union (APWU) requires that a bidding process shall be conducted, senior qualified prior to any assignments. The Respondent failed to grant or accommodate Thomas his preference pursuant to the established National Agreement.

Pursuant to the Official Notice of Assignment exhibit #4, Thomas was **intentionally** and **wrongfully** reassigned to a different shift via the Respondent denying Thomas his seniority rights, and falsifying Official Personnel Records, which resulted in a significant change in benefits (an adverse employment action).

Year to date Petitioner Official Personnel Records remains falsified.

Exhibit #4 an falsified action reflects that A bidding process was conducted, dated October 12, 1996, as oppose to the **5th question and answer of exhibit #5** reflects that there was no bidding process conducted during time period of January 1996 through February 1997. Please notice that the signatory for both exhibit #4 and exhibit #5 are the same.

Exhibit #4 clearly demonstrates that the shift change resulted from the falsification of the Official Notice of Assignment, which could certainly be construed by fact-finders as a discriminatory, retaliatory, and as an actionable adverse employment action. *In Aviles v. Cornell Forge Co.*, 241 F.3d 589, 593 (7th Cir. 2001), the 7th Circuit ruled that filing a false report would violate the retaliation provision. However inasmuch to this ruling the Respondent falsified Official Personnel Records.

REASONS FOR GRANTING THE PETITON

Burlington N. & Santa Fe R.R. Co. v. White, 548 U.S. ____, (2006), U.S. Supreme Court Justice Breyer put it, "the significance of any given act of retaliation will often depend upon the particular circumstances, **Context matters**".

In *Washington v. Ill. Dept. of Revenue*, 420 F.3d 658 (7th Cir. 2005) states "changes in work hours will normally not sustain a retaliation claim." Even though the term "normally" leaves some room for interpretation, the notion that the defendant's adverse actions against Thomas consisted of a mere shift change serves to mischaracterize the facts as immaterial.

In the Defendant Circuit Rule 54 Statement holds that the actions taken against the Plaintiff do not qualify as "materially adverse" in regards to his claim of discrimination. While in *Washington v. Ill. Dept. of Revenue*, 420 F.3d 658 (7th Cir. 2005) states "material is one of those protean words that resist further definition. This holds open some potential to say that an act that would be immaterial in some situations is material in others". The point is that only a careful sifting of the facts will determine what constitute adverse employment action, even where economic factors and title remain the same.

Per *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986), a "disputed issue of fact is 'genuine' if the evidence is such that a reasonable fact finder could find in favor of the non-moving party ... A fact is "material" if it has the potential to affect the outcome of the case." The falsification of official personnel records (by the defendant) is a fact that has the potential to affect the outcome of this particular case, and so should be considered material. Through preponderance of evidence (enclosed) and in according to the facts in these exhibits, it's clear that the defendant engaged in actions of Retaliatory Discrimination through its 1) Falsification of Thomas' official personnel records, and 2) Denial of Thomas' seniority rights.

Another instance that demonstrates the material nature of the defendant's actions has to do with discrimination. Per *Washington v. Ill. Dept. of Revenue*, 420 F.3d 658 (7th Cir.

2005), "'discrimination' entails a requirement that the employer's challenged action would have been material to a reasonable employee, which means that the same requirement applies to §2000e-3(a), the anti-retaliation clause, as well as other provisions in Title VII that use the word 'discrimination'." Whereas, if falsification of records denied Thomas his seniority rights, if seniority rights by definition are a benefit of employment, and if a reasonable person would consider denial of seniority benefits to be "material," then the defendant's challenged action in this case should be evaluated in terms of Retaliatory Discrimination.

CONCLUSION

Base on the facts, this case is not predicated on a mere schedule change, but includes falsification of Petitioner Official Personnel Records, and denial of Petitioner seniority rights, collectively these are acts of Retaliatory Discrimination, which falls under the anti-discrimination clause Title of the Civil Rights Act. Thereby the Defendant actions do not rise to level of a legitimate Non-discriminatory business decision and summary judgment is inappropriate. For these reasons, this court should vacate the Seventh Circuit Court of Appeals' decision and remand this case to the District Court for trial on the merits

Petitioner respectfully submits to this court to affirm its historic mandate, "Equal Justice under Law".

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CERTIFICATION

The foregoing is restricted to the grounds specified in 44.2 S. Ct. R. and it is presented in good faith and not for delay.

Michael A. Thomas /PD

Michael A. Thomas
Pro Se

APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
CHICAGO, ILLINOIS 60604

No. 05-1454
[Filed October 11, 2006]

MICHAEL A. THOMAS *Plaintiff-Appellant*,	)
v.	)
JOHN E. POTTER, *Defendant-Appellee*.	)

Appeal from the United States District Court
for the Northern District of Illinois,
Eastern Division.

No. 02 C 3576
James B. Zagel, *Judge*

Before Hon. RICHARD A. POSNER, *Circuit Judge*,
Hon. DIANE P. WOOD, *Circuit Judge*
Hon. TERENCE T. EVANS, *Circuit Judge*

ORDER

Michael Thomas brought suit under Title VII, alleging that the United States Postal Service retaliated and discriminated against him based on his gender when it changed his shift schedule. The district court granted summary judgment for the Postal Service, concluding that a mere change in shift schedule which does not materially affect the terms of employment cannot constitute an adverse employment action. We affirmed in *Thomas v. Potter,* No. 05-1454, 2005 WL 1994328 (7th Cir. Aug. 18, 2005). The Supreme Court subsequently held in *Burlington Northern & Santa Re Railway Co. v. White,* 548 U.S. ___, 126 S.Ct. 2405 (2006), that the anti-retaliation provision of Title VII is not limited to actions that materially affect the terms and conditions of employment, but rather "an employer can effectively retaliate against an employee by taking actions not directly related to his employment or by causing him harm *outside* the workplace." *Id.* at 2412-13 (italics in original). In so holding, the Court noted with approval that other circuits, including this one, have declined to limit the scope of the anti-retaliation provision. *See id.* at 2410-11 (citing *Washington v. Illinois Department of Revenue,* 420 F.3d 658, 662 (7th Cir. 2005)). Shortly thereafter, the Supreme Court granted Thomas' petition for a writ of certiorari and remanded the case to this court for further consideration in light of the decision in *Burlington Northern.* We invited the parties to comment on the effect *of Burlington Northern.* On consideration *of Burlington Northern* and the parties' comments, we again affirm the district court's judgment.

The proper inquiry under *Burlington Northern* and our *pre-Burlington Northern* case law is whether a reasonable employee would have found the challenged retaliatory act materially adverse in that it would dissuade a reasonable

worker from filing a charge, regardless of whether the act is employment-related. *Burlington Northern,* 126 S.Ct. at 2414-16; *Washington,* 420 F.3d at 661-63. Here, the purported retaliatory act--the change to Thomas's shift schedule–is directly related to his employment. Therefore *Burlington Northern* does not alter the outcome of this case, unless there was intentional, non-employment-related harm to Thomas from the shift change. *Burlington Northern,* 126 S.Ct. at 2415-16 (citing *Washington,* 420 F.3d at 662). In *Washington,* we concluded that a jury could find that Washington's employer retaliated against her because it exploited her "unique vulnerability" by changing her work schedule knowing that she would be required to take two hours of leave per day to care for her disabled son. *Washington,* 420 F.3d at 662-63.

However, unlike in *Washington,* Thomas does not assert--nor does the record contain any evidence--that he had a unique vulnerability that the Postal Service knew about and sought to exploit by changing his shift schedule. Thomas's assertion that the shift change was undesirable or inconvenient to him does not rise to the level of harm sufficiently serious to "dissuade[ ] a reasonable worker from making or supporting a charge of discrimination." *Burlington Northern,* 126 S.Ct. at 2415 (quoting *Washington,* 420 F.3d at 662). In any event, Thomas identifies no evidence that the Postal Service imposed the shift change with the knowledge or intention that Thomas would consider it undesirable or inconvenient. Accordingly, we cannot say that the district court erred in concluding that Thomas failed to demonstrate that the challenged retaliatory act had a materially adverse effect on him.

AFFIRMED.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
CHICAGO, ILLINOIS 60604

No. 05-1454
[Filed December 14, 2006]

MICHAEL A. THOMAS)
Plaintiff-Appellant,)
)
v.)
)
JOHN E. POTTER,)
Defendant-Appellee.)
)

Appeal from the United States District Court
for the Northern District of Illinois,
Eastern Division.

No. 02 C 3576
James B. Zagel, *Judge*

Before Hon. RICHARD A. POSNER, *Circuit Judge,*
Hon. DIANE P. WOOD, *Circuit Judge*
Hon. TERENCE T. EVANS, *Circuit Judge*

ORDER

Plaintiff-Appellant filed a petition for rehearing and rehearing en banc on November 27, 2006. No judge in regular active service has requested a vote on the petition for rehearing en banc and all members of the original panel have voted to DENY rehearing. Accordingly,

IT IS ORDERED that the petition for rehearing be, and the same is hereby, DENIED.

APPENDIX C

EXHIBIT # 4

MAINTENANCE MANAGER
CHICAGO PROCESSING & DISTRIBUTION CENTER

UNITED STATES POSTAL SERVICE

Thomas M.
5474
Maintenance Support Clerk PS-5

Official personnel records indicates you failed to receive a position during the bidding process. Accordingly you are now considered an unassigned regular employee.

This notice serves as official notification of such and advises of your new assignment within the Central Facility.

Assignment:	Maintenance Support Clerk PS-5
Work Schedule:	Tour 3
Non-Schedule Days:	THU/FRI

The effective date of your new assignment is October 12, 1996.

/s/Charles S. May
for John U. Garcia

FJR/fjr

cc: Herby Weathers, Jr.
Personnel

Date Rec'd _____

Signature _____

APPENDIX D

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

Case No. 02C3576
EXHIBIT #5

MICHAEL A. THOMAS	)
	)
Plaintiff	)
	)
v.	)
	)
JOHN E. POTTER,	)
POSTMASTER GENERAL - -	)
UNITED STATES POSTAL SERVICE,	)
	)
Defendant	)
	)

DEFENDANT'S RESPONSE TO
PLAINTIFF'S INITIAL REQUESTS FOR ADMISSION

COMES NOW the Defendant, John E. Potter, Postmaster General, United States Postal Service, and respectfully submits its Response to Plaintiff's Initial Requests for Admission.

1. Plaintiff PS Form 50 (exhibit #14) states that "in accordance with grievance settlement 1-J-1159-93 seniority

will be 10-03-92 as unassigned regular. However, are there any stipulation of becoming unassigned regular agree upon pursuant to the Plaintiff EEO Settlement Agreement of December 5, 1994 (exhibit #13)?

ANSWER: The settlement agreement does not state that plaintiff will be designated an unassigned regular. Plaintiff was designated as "unassigned" because there were no positions available when he was placed into the job pursuant to the EEO settlement agreement.

2. Pursuant to section 2D of the MOU (exhibit #1) were there any unassigned maintenance employees that was allowed to excise their preference by craft seniority?

ANSWER: No maintenance employees were allowed to exercise options under 2D of the MOU dated 1/5/96.

3. Were the five aforementioned female listed in this complaint, classified as an unassigned employee during the period of January 1996 through June 1999?

ANSWER: The five female employees identified by Plaintiff in his Complaint were listed as unassigned employees during the subject time period.

4. In regard to the five aforementioned female employees, did their tour change?

ANSWER: Their tours did not change during the time period identified in number 3 above.

5. Was there a bidding process conducted for the unassigned Maintenance Support Clerk during the period of January 1996 through February 1997?

ANSWER: There was no bidding process during the subject time period.

6. Prior to the Plaintiff receiving his official Notice of Assignment (exhibit#3) was the Plaintiff afforded an opportunity to exercise his preference?

ANSWER: Neither plaintiff or any other maintenance support clerk was allowed to exercise their preferences.

I declare under penalty of perjury, that the foregoing information contained in Defendant's responses to Plaintiff's Initial Requests For Admission is true and accurate to the best of my knowledge.

/s/_____
Charles E. May
Maintenance Manager
Chicago Processing &
Distribution Center
United States Postal Service